SOCIAL INTIMACY AS PROOF OF ADULTERY.

Judge Christian in suit for divorce before our supreme court in 1871, boasted that but two reported cases could be found in all its judicial history from the foundation of the Commonwealth down to the present time, touching questions arising out of the separation of husband and wife. And the two cases referred to were not suits for divorce, but for alimony. But how great would be his regret and chagrin could he scan our reports since that time, and see the effect that social progress and social reform has wrought in the hitherto inviolable sanctity of the marriage bond in this state. And necessarily the increase in the number of actions for divorce, and the increased freedom, or rather laxity brought about by this so-called social progress, which means nothing more than greater sexual license, gives enhanced importance to the question, of what weight is social intimacy as evidence to prove marital infidelity. Social intimacy, however reprehensible it may be because of its constant recurrence and disregard for the feelings of the other consort, is entitled to little or no weight in the absence of something further to suggest an illicit motive, and this because of that element of jealousy which must always be reckoned with, and which alone may arouse the one to seek a separation because of it without any further real cause, and the other to practice such acts for no other purpose than to bring about this hasty conduct on the part of the petitioner. On the other hand, if a single token of mutual lust is clearly established, it will relate back and contaminate the whole course of intimacy between them, otherwise apparently decorous, and if an adulterous disposition on their part is shown, and if opportunity be shown to have existed, this will demonstrate the illicit motive of the intercourse, and will be sufficient to establish adultery. But the evidence of an illicit disposition, to have the effect of proving the fact of adultery, must be clear and convincing. In short, an adulterous disposition is not shown by too great intimacy between the parties, but an adulterous inclination, and opportunity to gratify it, must concur. For example where an adulterous inclination is shown, and secret meetings, occupancy of adjoining rooms with a connecting door, etc., might be sufficient to prove the charge. In an anonymous case where the

evidence on which the appeal turned was that of an intimate social acquaintance, and frequent interviews, with, perhaps, occasional opportunity, but with a total absence of any credible evidence of lustful disposition, the court well said that their duty in the inquiry was to see whether there were circumstances of suspicion which, fairly construed, led to the conclusion that these interviews, and that association, were suggested or brought about by reason of difference of sex only, and with the intention to gratify a desire which would arise only by reason of that difference. The cases reiterate in substance that although direct proof can not usually be obtained, yet in its absence the court must be satisfied "that criminal attachment subsisted between the parties, and that opportunities occurred when intercouse in which it is satisfied the parties intended to indulge, might, with ordinary facility, have taken place" (Davidson *v.* Davidson, D. & S., 132, 135). An adulterous disposition must therefore be established. The burden of doing this is upon the plaintiff. The plaintiff enters upon the controversy with no presumption in favor of its existence, and has the affirmance throughout the litigation, and must maintain it by clear and conclusive proof. This would be so in any case of alleged fraud or wrongdoing, and the rule should not be relaxed upon an issue "involving the grievous sin." (Mordaunt *v.* Moncreiffe, 2 S. & D. Appeals, 375.)

To hold otherwise would require us to assume that man looks upon a woman only to lust after her, and that she, with knowledge of such desire, is ready to receive his advances in order to gratify them. The rule of law is otherwise. It presumes that the defendant is innocent of any violation of his marriage vow, and that he observed the obligations of his contract. A professional man may visit his female pupil, client, patient or parishioner without imputation upon his chastity, and indeed those conditions are exceptional under which, from mere association of the sexes, a presumption may be permitted that the woman has been solicited. If a married man, without any other reason than her sex, calls upon a prostitute, her lewdness or the reputation of it would "help to explain his conduct." Clements *v.* Kimball, 8 Mass. 635. But even then, before adultery could be inferred, some evidence would be required of disposition and opportunity;

and if the woman is falsely so termed, and, contrary to rumor, is in fact chaste, the party seeking the benefit of an unfavorable inference from the fact of such rumor and association must fail. Adultery might be in the heart, yet the offense uncommitted, and until that is proven all else is naught. These suggestions are obvious, and only show that in the absence of criminating circumstances mere association and intercourse between man and woman can not be attributed to an improper purpose, and their application will solve the issue in this case. Intimately connected with this question is the further one, whether guilt must be established by anything more than a mere preponderance of proof, such as is sufficient in ordinary civil issues. The better opinion is that the legal presumption of innocence stands in aid of the defendant and enhances the burden of proof beyond that which arises on a question of contract or ordinary breach of duty involving only pecuniary liability. Whether proof beyond reasonable doubt is required, as in criminal cases, is disputed; but undoubtedly the language of the American chancellors and judges of the best experience and highest authority, uttered in determining causes which have received the most careful consideration, gives much sanction to what is certainly the natural insinct of justice, that so gross a charge against one, the purity of whose life is otherwise unimpugned, should be supported by equally cogent evidence as that which the law requires in case of more common and more venial, although technically "criminal" offenses.